IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 751 of 2005
In
SPECIAL CIVIL APPLICATION No. 1718 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NANUBEN BHIKHUBHAI VARNANGAR - Appellant(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR PJ KANABAR for Appellant(s) : 1,MR PANKAJ R DESAI for Appellant(s) : 1,
MS HANSA B PUNANI AGP for Respondent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/04/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 19.1.2005 of the learned Single Judge dismissing the appellant- widow's claim for family pension on the ground that the appellant's husband-deceased employee had rendered service for less than five years and also on the ground that the claim for family pension was made by the appellant – widow 25 years after the death of the deceased employee.

2. The husband of the appellant (hereinafter referred to as “the deceased”) was employed as an armed police constable on 26.1.1965. The deceased was made permanent on 14.2.1969. On 25.7.1969, the deceased was suspended from service in connection with the offence punishable under Section 302 IPC registered as CR No.64 of 1969, which case was tried as Sessions Case No.11 of 1970. The deceased was acquitted in the said sessions case on 28.5.1970. It appears that another incident which took place on 24.7.1970 gave rise to two cross complaints, one filed by the deceased being CR No.136 of 1970 against Bhabhlu Musa for inflicting knife wounds on the deceased and, therefore, for the offence punishable under Section 307 IPC. Ultimately, the deceased succumbed to the injuries on 26.7.1970. The other complaint being CR No.137 of 1970 was filed against the deceased in connection with the same incident for the offence punishable under Section 302 IPC.

3. On 20.4.1992 (Annexure-I to the petition), the appellant herein- widow of the deceased sent a notice under Section 80 of the Civil Procedure Code calling upon the Chief Secretary, Director General of Police and District Superintendent of Police, Amreli to give family pension to the appellant. The claim was disputed by the DSP, Amreli vide reply dated 7.5.1992 (Annexure-J to the petition) stating that the service rendered by the deceased was not pensionable and, therefore, no pension or family pension was payable. However, an amount of Rs.1060/- was paid as gratuity. It appears that thereafter also the appellant was pursuing the matter with the authorities by sending applications in December 1992, May/October 1993 etc.. Since the appellant did not succeed before the departmental authorities, the petition giving rise to this appeal came to be filed in February 1995. It appears that no affidavit-in-reply was filed on behalf of the respondent-authorities, but the matter was argued on the basis that the deceased not having rendered five years continuous service, his widow was not entitled to receive family pension. As already indicated earlier, the delay in filing the petition also seemed to have weighed with the learned Single Judge.

4. After issuance of notice in this appeal, the DSP, Amreli filed affidavit dated 19.7.2005

indicating the broad facts already stated hereinabove and referring to the Government Resolution dated 1.1.1972 introducing the family pension scheme w.e.f. 1.6.1971 and stipulating five years of continuous service as the condition precedent for availing the benefit of family pension. Reference is also made to the Government Resolution dated 19.5.1989 in making the family pension scheme applicable from 1977 even in case of those employees who had rendered five years continuous service prior to 1972. The stand of the authorities was that in view of the suspension of the deceased for the period from 25.7.1969 onwards, the deceased was not in active service for a period of five years since he was in active service only for the period from 25.1.1965 to 25.7.1969. Reference was also made to the criminal case filed against the deceased for the offence punishable under Section 302 IPC, which was registered as CR No.137 of 1970 at Rajula Police Station. The deponent of the reply affidavit further stated that the DSP Amreli passed order dated 15.9.1970 treating the period between 25.7.1969 to 26.7.1970 as under suspension and entry to that effect was made in the service book of the deceased.

5. The appellant herein filed rejoinder affidavit dated 29.7.2005 pointing out that the State Government had through notification dated 25.1.1979 and again through resolution dated 8.11.2000 provided

that when an employee under suspension expires before conclusion of the departmental inquiry or the criminal proceedings, the period between the date of suspension and the date of death shall be considered as on duty for all the purposes as if such employee was not placed under suspension. The authorities have not pointed out any subsequent resolution laying down any different principle.

6. Mr Kanabar, learned counsel for the appellant has submitted that in view of the Government Resolution dated 8.11.2000, the authorities were required to treat the period between the date of suspension and the date of death as on duty as if such employee was not put under suspension and the salary and allowances to which he was entitled was required to be paid. It is submitted that the entry made by the DSP on 15.9.1970 for treating the period in question as the period of suspension cannot take away the benefit of family pension payable to the appellant under the Government Resolutions providing for family pension to the widow of the deceased employee who had rendered total five years service including the period of suspension even if such service was rendered prior to 1972. Strong reliance is placed on the decision of a learned Single Judge of this Court in **Kamlaben wd/o Govindlal Harilal Sheth vs. State of Gujarat, 1989 (2) GLH 437**, which decision was the foundation of the subsequent

GR dated 19.5.1989. It is submitted that in the said judgment, the Court had directed the authorities not only to remove the cut-off date of June 1, 1971 stipulated in the Government Resolution dated October 17, 1977, but also directed the authorities to pay family pension to the heirs of the deceased employee who had retired or died prior to June 1, 1971 and arrears of pension were directed to be paid w.e.f. October 1, 1977.

The learned counsel also relied on the decision of the Apex Court in **SK Mastan Bee vs. General Manager, South Central Railway, (2003) 1 SCC 184** in support of the contention that the delay in filing an application for family pension or the delay in filing the writ petition cannot come in the way of the widow of the deceased in getting the family pension because it was obligatory for the employer to have computed the family pension and offered the same to the widow without her having to make a claim or without driving her to litigation. It is, therefore, submitted that the appellant is entitled to family pension and also arrears of family pension w.e.f. October 1, 1977.

7. On the other hand, Ms Hansa Punani, learned AGP has opposed the appeal and submitted that the Government notification dated 25.1.1978 had made the following provision,

> “In respect of the period of suspension, unless there is specific entry in the service book/ record to the effect that the period is not to count for pension, it will be presumed that the period of suspension would count for pension and should accordingly be reckoned towards the qualifying service.”

It is submitted by the learned AGP that once the DSP, Amreli had made an entry in the service book on 15.9.1970 that the period of suspension from 25.7.1969 till the death of the deceased on 26.7.1970 was treated as the period of suspension, by virtue of the aforesaid Government notification dated 25.1.1978, the presumption that the period of suspension would count for pension and should be reckoned towards the qualifying service was not available to the appellant.

In the alternative, it is submitted that till this Court rendered the decision on 13.2.1989 resulting into the modification of the family pension scheme, as embodied in the Government resolution dated 19.5.1989, no family pension was payable to the heirs of the employee who had died before 1.6.1971, but there was a scheme for payment of lumpsum financial relief as contained in the Government resolution dated 17.9.1981, but even the benefit under that scheme was available only to a widow whose husband had put in five years of

continuous qualifying service. Since the deceased had not put in five years of continuous qualifying service, the appellant was not entitled to even such relief.

Further alternatively, it is also submitted that in any view of the matter, the appellant having moved this Court 25 years after the death of her husband, the appellant is not entitled to any amount by way of arrears of family pension for the period prior to the date of filing the petition i.e. prior to February 1995.

8. Having heard the learned counsel for the parties, we are of the view that once this Court held in the case of Kamlaben wd/o Govindlal Harilal Sheth vs. State of Gujarat, 1989 (2) GLH 437 that the cut-off date of June 1, 1971 stipulated in the Government resolution dated October 17, 1977 was arbitrary and the Court directed the Government to pay family pension to the widows and dependents of employees who had died prior to June 1, 1971 and that decision not only became final, but came to be accepted and implemented by the Government by issuing the Government resolution dated 19.5.1989, the appellant's claim for family pension was required to be considered in accordance with the said Government resolution dated 19.5.1989. It is true that under the said scheme, the deceased employee ought to have

completed five years qualifying service for his widow to become entitled to family pension. It is also true that in view of the language employed in the Government notification dated 25.1.1978 the presumption that the period of suspension would count for pension would not be available if a specific entry in the service book/ record was made to the effect that the period is not to count for pension and it is also true that the DSP had made an entry in the service book of the deceased on 15.9.1970 that the period of suspension shall be treated as suspension, but it does not necessarily follow that the entry was made to the effect that the period was not to count for pension. Admittedly, the deceased was placed under suspension from 25.7.1969 and, therefore, merely making an entry in the service book after the death of the employee that the period of suspension shall be treated as a period of suspension does not carry the authorities' case any further so as to take the case out of the presumption raised by the notification dated 25.1.1978. However, we need not rest our conclusion merely on the aforesaid basis because in the Government Resolution dated 8.11.2000, the Government specifically took a conscious policy decision that the family members of the deceased employees who were under suspension at the time of death were facing great difficulties in getting the benefit of family pension and that in order to avoid such difficulties, the Government resolved as under:-

> “Before the departmental inquiry or criminal proceeding is completed in the event of death of an employee under suspension, the period between the date of suspension and the date of the death shall be considered on duty for all the purposes as if such employee was not put under suspension and the salary and allowances for which he was entitled the same salary and allowances shall be paid to his family members. However, at the time of making the payments of such amount, the amount paid by way of subsistence allowance to the Government employee should be recovered from the amount of family pension, gratuity and the amount of leave encashment.”

It was also further provided that the power to consider the suspension period as on duty will be with the authority which has the power to pass the order of suspension and no approval of Finance department is required for this purpose. The Government Resolution dated 8.11.2000 went further than the earlier Government notification dated 25.1.1978 had stopped by raising the presumption that the period of suspension would count for pension and should accordingly be reckoned towards qualifying service.

9. In our view, therefore, the period between 25.7.1969 and the date of death i.e. 26.7.1970 could not have been excluded by the authorities while counting the qualifying service of the deceased employee. Accordingly, the period from 25.1.1965 to 26.7.1970 worked out to exactly 5 years and 6 months

and, therefore, the deceased had put in the minimum requisite qualifying service of five years and, therefore, the appellant as a widow of the deceased employee was entitled to get family pension under the Government Resolution dated 19.5.1989.

10. As regards the question of delay, we find considerable substance in the submission made by Mr Kanabar for the appellant that the deceased was placed under suspension on 25.7.1969 in connection with CR No.64 of 1969 which resulted into Sessions case No.11 of 1970. The deceased employee who was an armed police constable and had gone to carry out a prohibition raid was not only acquitted by the learned Sessions Judge, but came to be honourably acquitted in terms of the following observations:-

> “.... I uphold the defence version that the accused committed no offence. He deserves to be acquitted... I would like to make the necessary observation, namely, that the greater probability is that the accused acted in the right of self-defence and that the prosecution version is far from truth. The greater probability is that the incident happened in the manner alleged by the accused rather than in the manner alleged by the prosecution.”

Mr Kanabar further stated that in the second incident giving rise to two cross complaints, it was the son of the person who had died in the first incident, who inflicted fatal injuries on the

deceased on 24.7.1970 and the complaint of the deceased was filed first being CR No.136 of 1970 but unfortunately, the deceased succumbed to the injuries on 26.7.1970. It is, therefore, submitted by Mr Kanabar that even in the second incident the deceased had not intended to cause death of any person, but he acted in self-defence when the son of the person who had died in the first incident had assaulted the deceased i.e. the husband of the appellant.

11. We are not required to go into the merits of the accusations or the merits of the cross complaints, but the fact remains that both the incidents, the first incident on account of which the appellant was placed under suspension and ultimately the appellant came to be honourably acquitted in the criminal case and the second incident in which the deceased employee lost his life were prima-facie connected with the duties of the appellant as an armed police constable. The facts are, therefore, required to be examined in this perspective while considering the question of delay on the part of the widow in lodging her claim for family pension. Besides we also find that the Apex Court has observed in **SK Mastan Bee vs. General Manager, South Central Railway, (2003) 1 SCC 184** that when the widow of a deceased employee is an illiterate person who did not know of her legal right and had no access to any information as to her right to family pension and

to enforce her such right, it was obligatory for the husband's employer to have computed the family pension and offered the same to the widow without her having to make a claim or without driving her to litigation.

12. In the facts of the present case, it was upon the decision having been rendered by this Court in Kamlaben wd/o Govindlal Harilal Sheth vs. State of Gujarat (supra) on 13.2.1989 and the issuance of Government resolution dated 19.5.1989 that the appellant became entitled to get family pension because till then the dependents of the employee who had died before 1.6.1971 were not entitled to any family pension. Hence the relevant date for considering the question of delay would not be the date of the death of the deceased employee, but from 18.5.1989 the appellant did initiate the process for claiming family pension from 20.4.1992 and even slightly earlier as would appear from the documents on record and, therefore, the appellant did lodge her claim within a period of three years from the date of the Government resolution conferring the right of family pension on the appellant. We are, therefore, of the view that the appellant's claim could not have been rejected on the ground of delay either.

In the facts and circumstances of the present case, we are of the view that the interests

of justice would be served if the respondent-authorities are directed to pay the appellant family pension w.e.f. 1.4.1989.

13. As regards the prayer for interest made by the learned counsel for the appellant, the learned AGP submits that when the appellant filed the petition 25 years after the death of the deceased employee, no interest should be awarded to the appellant.

14. It is true that there has been some delay in filing the petition, as discussed above. However considering the fact that we are not awarding the appellant arrears of family pension from 1.6.1977 as claimed by her and that the arrears of family pension are being awarded only from 1.4.1989 and also considering the fact that even after filing of the petition i.e. in February 1995, the authorities did not examine the appellant – widow's case in light of the relevant Government resolution pointed out by the appellant in the present appeal proceedings and that the petition was filed as far back as in February 1995, we are of the view that the interests of justice would be served if the appellant is awarded interest at the rate of 6% p.a. on the amounts due and payable on and from 1.4.1995 till the date of payment. In case the respondents fail to comply with the directions within the time limit stipulated in

this judgment, the respondents shall be liable to pay interest at the rate of 9%p.a..

15. In the result, the appeal is allowed. The judgment and order dated 19.1.2005 of the learned Single Judge is set aside. Special Civil Application No.1718 of 1995 is allowed and the respondents are directed to treat the appellant as eligible for family pension under the Government Resolution dated 19.5.1989 and to pay the appellant arrears of family pension with effect from 1.4.1989 till 30.4.2006 with interest at the rate of 6%p.a. from 1.4.1995 till the date of payment, within two months from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier. The family pension falling due from 1.5.2006 onwards shall also be regularly paid to the appellant as and when the same falls due. In case the respondents fail to comply with the aforesaid directions within stipulated time, the respondents shall pay interest at the rate of 9%p.a. from 1.4.1995 till the date of payment.

(M.S. SHAH, J.)

(HARSHA DEVANI, J.)

zgs/-